

International-Lawyers.Org Comments to the Global Consultation
on the Right to Challenge the Lawfulness of Detention before Courts

International-Lawyers.Org welcomes the Global Consultation on the Right to Challenge the Lawfulness of Detention before Courts organized by the UN Working Group on Arbitrary Detention and especially the drafting the Principles and Guidelines on Remedies and Procedures of the Right of Anyone Deprived of His or Her Liberty to Bring Proceedings Before Court, in Order that the Court May Decide Without Delay on the Lawfulness of His or Her Detention.¹ We offer the below comments in relation to the specific issue of Detention in Armed Conflicts, States of Emergency or for Counterterrorism Purposes.

1. The need to ensure equality of arms

Persons accused of terrorism and security offenses are often denied access to information about the charges against them. This denial of access to information is often based on highly generalized information. Examples are *F.K.A.G. et al. v Australia*, UN Doc CCPR/C/108/D/2094/2011, and *M.M.M. et al. v Australia*, UN Doc CCPR/C/108/D/2136/2012, in which defendants in cases concerning alleged security offenses were held on the basis of undisclosed information. In the United States numerous cases concerning the application of the Foreign Terrorist Organization (FTO) Act organizations and individuals were placed on the United States FTO on the basis of undisclosed information. The 8 U.S. Code § 1189 concerning designation of foreign terrorist organizations allows the determination to be made based on undisclosed information in its section 4(B)(iv)(III). This is despite the fact that the consequence of a FTO listing can be the loss of all one's resources and imprisonment. More recently, such consequences may even include being targeted for killing.

With such dire consequences it is essential that defendants be put in a position to defend themselves with equal vigor as those who accuse them. This is impossible if the evidence against them is not made available to them. Moreover, despite the dire consequences associated with being accused of security offense, including terrorism, and, despite the fact that both international law and most domestic laws provide for equality of arms especially in domestic criminal proceedings, some States continue to deny defendants in security cases access to information.

There is currently a case before the Working Group in which a State not only denied a defendant access to information against him for any of the crimes for which he was accused even those not related to imminent security, such as illegal entry to a country, but also denied the defendant access to information indicating convincingly that he would be tortured if turned over to another country. The State had argued based on undisclosed evidence that the individual would not be tortured. The courts of the State concerned held that the government's belief as reasonable. After the person was turned over he was tortured after being convicted of a crime for which the State detaining him in first instance held clearly exculpatory evidence.²

2. The need to ensure the burden of proof on State

Related to the first comment is the principle, widely supported by the practice of regional and universal human rights bodies, that the burden of proof for justifying detention lies on the State concerned. A detainee or defendant should not have to prove his or her innocence until the State has made out a

1 Background Paper for the Stakeholder Consultation held by the WGAD on 1 and 2 September 2014 at the United Nations Office in Geneva.

2 The person was convicted of illegal entry into the second country to whom he was turned over; while the first State that has denied him refused to provide him his passport in which a valid entry authorization to the second state had been granted.

prima facie case with evidence to which the detainee or defendant has access.

This principle is not uniformly respected by States and particularly in cases involving security or terrorism related charges.

3. The need to recognize extraterritorial responsibility

The International Court of Justice,³ Human Rights Committee, the Committee against Torture, the European Court of Human Rights,⁴ and the Inter-American Commission on Human Rights⁵ have all unambiguously applied international human rights law to actions under the control of a State that are carried out abroad. Such an understanding is consistent with the general understandings of State responsibility that have been expressed by the International Law Commission in its Draft Articles on State Responsibility for an Internationally Wrongful Act.

4. The necessity of adequate assessment of transfers and recourse for consequences of inadequate or incorrect evaluations

Especially in armed conflicts and as concerns counterterrorist activities carried out beyond the borders of a country, detainees who are detained by States are sometimes transferred to another State either after charge or before they are even charged. As the investigation of numerous cases of extraordinary rendition indicates,⁶ individuals who were transported by or turned over by European countries to the United States' at its Naval Base in Guantanamo Bay, were often tortured quite seriously without any meaningful opportunity to invoke their human rights.

The jurisprudence of the UN Human Rights Committee,⁷ the UN Committee against Torture,⁸ the European Court of Human Rights,⁹ and the African Commission on Human and Peoples' Rights¹⁰ has held that a State in which a person is found is as responsible for the violation or threat of violation of the human rights of the person as is the State to which the person is sent, which carries out the acts that violate the human rights of the person concerned.

Recommendations:

1. That the Working Group include in its Principles and Guidelines a statement of the need for States to provide for equality of arms for detainees who are defendants in security related cases.
2. That the Working Group include in its Principles and Guidelines a statement of the need for States to provide that the State has the burden of proof and that this burden be met in a manner that is made known in detail to detainees who are defendants in security related cases.

3 See, for example, *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Reports (9 July 2004) at p. 48, note 111, and *Armed activities on the territory of the Congo (Democratic Republic of the Congo v. Uganda)*, ICJ Reports (19 December 2005) at p. 216.

4 See, for example, *Loizidou v. Turkey*, Appl. No. 40/1993/435/514 (1996).

5 See, for example, *Bamaca Velásquez v. Guatemala*, Inter-Am. Comm. No. 70 (25 November 2000) at § 207, *Awasi Tingni v. Nicaragua*, IHRR 153 (2001), and *Victor Saldano v. Argentina*, Inter-Am. Comm. Report No. 38/99, OEA/Ser.L/V/II.95 Doc. 7, rev. at 289 (1998) at sec. IV, note 17.

6 See, generally, Open Society Foundation, *Globalizing Torture: CIA Secret Detention and Extraordinary Rendition* (2013).

7 See, for example, *Coard, et al. v. United States*, Report No. 109/99 (29 September 1999).

8 See, for example, *Tapia Paez v. Sweden*, Comm. No. 39/1996 (28 April 1997).

9 See, for example, *Case of Soering v. The United Kingdom*, Appl. 14038/88, Judgment (Merits and Just Satisfaction), Plenary Court (7 July 1989).

10 See, for example, *John K. Modise v. Botswana*, African Commission on Human and Peoples' Rights, Comm. No. 97/93, Tenth Annual Activity Report 1996-1997, Annex X.

3. That the Working Group include in its Principles and Guidelines a Statement recognizing that States will be responsible for any actions carried out by actors or instrumentalities that it controls which violate or lead to the violation of human rights of detainees, including in security related case defendants, anywhere in the world.

4. That the Working Group include in its Principles and Guidelines a Statement recognizing that the initial detaining States will be responsible for adequately assessing that human rights will be respected whenever a detainee is transferred and that detainees will have recourse for consequences of inadequate or incorrect evaluation in cases where their human rights are seriously violated after a transfer.

We believe that consideration and inclusion of these four considerations in the Working Group's Principles and Guidelines will significantly enhance its contribution to the the protection of human rights.

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